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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF WASHINGTON URGING GRANTING OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

JOHN J. O'CONNELL
Attorney General of the State of Washington

JOSEPH L. CONIFF
Assistant Attorney General

MIKE JOHNSTON
Assistant Attorney General

DENNIS G. SEINFELD
Assistant Attorney General
Temple of Justice
Olympia, Washington

Attorneys for Amicus Curiae.

STATE PRINTING PLANT, OLYMPIA, WASH.

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Attorneys for Amicus Curiae.

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STATEMENT OF INTEREST

The State of Washington through its Department of Fisheries, Department of Game and Parks and Recreation Commission, being represented by its Attorney General, pursuant to Rule 42 (4), Revised Rules of the Supreme Court of the United States, urges the granting of petitioner's application for a writ of certiorari to review the decree of the United

States Court of Appeals for the Ninth Circuit in its opinion for the above-entitled case reported at 333 F. 2d 689 (June 8, 1964).

The Department of Fisheries is organized under Title 75 of the Revised Code of Washington (hereinafter referred to as RCW) and has the duty to propagate, protect, preserve, conserve and manage all food fish and shellfish of the state (RCW 75.08.020). The Department of Game is organized pursuant to Title 77 of RCW and has the duty to preserve, protect and perpetuate all game fish, animals and birds in the state (RCW 77.12.010). The Parks and Recreation Commission is organized pursuant to RCW 43.51 *et seq.* and has the duty to acquire, develop, operate and maintain parks, parkways and other recreational areas in the state (RCW 43.51.040; .050; .060).

The State of Washington, next only to Alaska, supports the largest anadromous fishery resource in the United States. It produces more hydroelectric energy than any state in the Union. Washington has long been concerned with the impact of hydroelectric projects on the anadromous fishery resources. A major portion of this state's economic structure is built around commercial and sport fishing for anadromous fish.[1]

Presently there are at least nine hydroelectric project license applications pending before the Federal Power Commission or the courts that have a

[1]Seventy-Second Annual Report, Washington Department of Fisheries, 1962, pages 125-211.

direct and substantial impact on Washington's anadromous fishery resources.[2] The operation and maintenance costs for anadromous fishery facilities for these various projects annually amount to hundreds of thousands of dollars and are totally borne by the respective licensees. Additionally hydroelectric projects ofttimes result in the elimination of existing, planned or future park sites[3] and game animal and bird rearing and habitat areas. Natural spawning areas for both salmon and steelhead are also inundated by projects of this nature.[4]

QUESTIONS PRESENTED

The State of Washington concurs in petitioner's delineation of the issues tendered by this petition for a writ of certiorari. In addition, we would offer the following question of general application presented by this controversy:

May the Federal Power Commission, having already determined pursuant to section 10(a) of the Federal Power Act[5] "a comprehensive plan for improving or developing a waterway * * * for the use and benefit of interstate or foreign commerce * * * and for other beneficial recreational uses, including recreational purposes," impose upon the

[2]Federal Power Commission Project Docket, Numbers 1971, 2062, 2241, 2243, 2273, 2316, 2324, 2342 and 2369.

[3]There are 103 state parks and 125 other recreational areas in Washington. *Washington Outdoor Recreation Guide*, Department of Commerce and Economic Development of Washington, 1964.

[4]For example, the Columbia River originally contained 1,500 miles of spawning areas, but hydroelectric projects have reduced this to 63 miles.

[5]41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1958 supp.).

licensee less than the total cost of developing such plan for the term of the project, thereby forcing the state to assume the difference between the licensee's contribution and the total project cost?

ARGUMENT

The State of Washington submits that there is a present need for judicial review of the Commission's decision in this case and, more importantly, for an interpretation of the Commission's statutory authority under section 10(a) of the Federal Power Act. The interpretation rendered by the Commission and the Ninth Circuit Court of Appeals will impose financial burdens upon every affected state and local governmental agency whenever the decision below is followed in allocating the cost of comprehensive plans of development. Neither California, Washington, nor any other state should be obligated to appropriate moneys for the fulfillment of a comprehensive plan which may or may not be a part of the overall planning programs of the affected state agencies which are operating within a well recognized area of state police power activity. *Geer v. Connecticut*, 161 U. S. 519 (1896). Should the California legislature fail to appropriate the necessary moneys to pay the operating and maintenance costs of the sort presented in the instant case, the "comprehensive plan" adopted by the commission pursuant to section 10(a) could never be realized. Congress could not have intended such a result.

CONCLUSION

For the foregoing reasons, the State of Washington respectfully urges the court to grant petitioner's application for a writ of certiorari.

Date: November 20, 1964.

Respectfully Submitted,

JOHN J. O'CONNELL
Attorney General of the State of Washington

JOSEPH L. CONIFF
Assistant Attorney General

MIKE JOHNSTON
Assistant Attorney General

DENNIS G. SEINFELD
Assistant Attorney General

Attorneys for Amicus Curiae.